Supreme Court, U.S.
FILED
SEP 23 1991
OFFICE OF THE CLERK

91-483

No. 91-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL DELO, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

KENNETH L. KENLEY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Volume I

WILLIAM L. WEBSTER
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Counsel of Record

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

PAUL DELO, Superintendent, Potosi Correctional Center, Petitioner, vs. KENNETH L. KENLEY, Respondent.	)	No. 91-_____

INDEX TO PETITIONER'S APPENDIX

Volume I

1. "Opinion," Nos. 89-2915 and 90-1015, **Kenneth L. Kenley v. Bill Armontrout** (United States Court of Appeals for the Eighth Circuit), Filed May 17, 1991 — A-1

2. "Memorandum," No. 88-2298C(3), United States District Court for the Eastern District of Missouri, Eastern Division, **Kenneth L. Kenley v. Bill Armontrout**, filed July 12, 1989 — A-51

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 89-2915 and 90-1015

Kenneth L. Kenley,	*	
	*	
Appellant,	*	
	*	Appeals from the United
	*	States
v.	*	District for the
	*	Eastern District of
	*	Missouri
Bill Armontrout,	*	
	*	
Appellee.	*	

Submitted: October 8, 1990

Filed: May 17, 1991

Before **McMILLIAN**, Circuit Judge, **HENLEY**, Senior Circuit Judge, and **STUART**,* Senior District Judge.

HENLEY, Senior Circuit Judge.

Appellant, Kenneth L. Kenley (hereinafter "Kenley"), was convicted in separate trials of

---

*The Honorable William C. Stuart, United States Senior District Judge for the Southern District of Iowa, sitting by designation.

capital murder and related noncapital offenses based on a spree of robberies that occurred on January 3 and 4, 1984. A summary of the crime facts appears in the opinion of the Missouri Supreme Court. State v. Kenley, 693 S.W.2d 79, 80-81 (Mo. 1985) (en banc). In sum, Kenley committed one murder, shot two bystanders, abducted two bystanders, stole two cars, committed several assaults, and robbed four businesses in just a few hours. Kenley was represented by appointed counsel. The two separate cases were based on essentially the same evidence, which included seven eyewitnesses to the murder and twenty-six total witnesses corroborating various aspects of Kenley's identity, his vehicles and his weapons. At the capital trial the jury found two aggravating circumstances, murder for value and the knowing creation of risk of death in a public place, and imposed the death sentence.

The capital appeal unsuccessfully alleged errors related to evidentiary issues, jury

procedures and violation of the eighth amendment. Kenley, 693 S.W.2d at 81-83. The noncapital appeal unsuccessfully alleged errors related to evidentiary issues and ineffective assistance of counsel. State v. Kenley, 702 S.W.2d 185 (Mo.App. 1985). Kenley then sought post-conviction relief from both the capital and noncapital sentences, received a hearing, but was denied relief by the Missouri Circuit Court (hereinafter "circuit court"). The claims were then reviewed by the Missouri Court of Appeals (hereinafter "appeals court") which affirmed the judgment of the circuit court. Kenley v. State, 759 S.W.2d 340 (Mo.App. 1988).

This appeal arises from the federal district court's (hereinafter "district court") denial of Kenley's petition for writ of habeas corpus. 28 U.S.C. Section 2254 (1990). The petition raises thirty-five grounds for relief as to the capital conviction and a dozen grounds for relief as to the noncapital convictions

(primarily claims of ineffective assistance of counsel).

Kenley argues, with respect to both the capital and noncapital claims, that the district court erred by: (1) finding no ineffective assistance of counsel during the guilt or sentencing phase of either trial, (2) finding many of Kenley's claims for relief procedurally barred, and (3) applying the presumption of correctness to state court findings too broadly. Because we believe Kenley received ineffective assistance of counsel during the sentencing phase of his capital trial, we reverse the judgment of the district court and remand this case to the district court with instructions that the State of Missouri resentence Kenley.

FACTS

The facts that follow represent a composite of the consistent findings made by the Missouri Courts and the district court, unless otherwise

stated. Appointed counsel was a new county public defender just three months out of law school with no trial experience. The trial occurred six months after appointment when counsel had one misdemeanor robbery trial under his belt. Counsel's time card from Butler County, Missouri indicates he spent roughly fifty hours in pre-trial preparation for Kenley's capital trial.

Counsel sought and received little outside assistance in preparing his case. Kenley's former social worker, Mrs. Crownover, initiated contact with counsel offering assistance, and counsel responded with a request for her records. The parties had no further contact. A letter from the Office of State Public Defender was also sent to counsel suggesting he associate with co-counsel, and offering case assistance in rural counties (such as Butler County) from more experienced public defenders elsewhere. Counsel did not respond to this letter but did testify

in the state post-conviction proceeding that he spoke with a former classmate and another attorney working as public defenders in St. Louis about the case. His former classmate had only misdemeanor experience.

Crownover's letter referred counsel to a Dr. Manion who had previously examined and treated Kenley in 1975. Counsel never contacted Manion. After receiving Crownover's records, counsel requested a psychiatric examination which was performed by Dr. Parwatikar in 1984 at Fulton State Hospital. Counsel testified that he discussed the Parwatikar report with a non-examining physician, Dr. Wiscowski, for six hours. This is not corroborated by his time card. Counsel testified he then decided not to introduce Kenley's background as mitigating evidence because the information was too old and insubstantial, Parwatikar's report was conclusively non-mitigating, and it was possible additional aggravating information would also be

introduced. Kenley, 759 S.W.2d at 345. Counsel apparently did not seek or review any other records of Kenley's background.

Each court before us reviewed the Crownover, Manion and Parwatikar information reviewed by counsel. Representative of their findings is this summary by the appeals court:

> . . . Kenley had been aggressive, hostile and went into uncontrollable rages and had shown improvement only while on medication in an institution; that Kenley grew up in a non-nurturing environment and had a violent and angry relationship with his father; that all attempts at control, help and treatment of him had proven futile; that Dr. Manion expressed the opinion that "treatment will facilitate adjustment, further adjustment"; and that the latest documentation by either witness was at least 6 years old.

Kenley, 759 S.W.2d at 347.

Prior to the capital trial, counsel waived an automatic change of venue despite the wide publicity Kenley's crimes had received. During voir dire, counsel performed little inquiry into the attitudes of the jurors toward capital punishment and into jurors' ability to consider a range of possible punishments. Counsel waived opening statement and only asked thirty-six cross-examination questions of eight out of twenty-six witnesses. Counsel did not challenge somewhat inaccurate descriptions of Kenley and his vehicle, did not challenge ambiguities and inconsistencies in witness statements, and did not object to a surprise pathologist's report. Counsel also did not object to the admission of cumulative and potentially prejudicial testimonial evidence regarding Kenley's identity, the victim's family, and other weapons unrelated to the crime. Counsel made a short, unremarkable closing argument and submitted no jury

instructions. Capital murder, second degree murder and manslaughter instructions were given by the court.

At the capital sentencing, counsel submitted no mitigating evidence although Kenley's age was stipulated and the prosecution introduced Kenley's single prior conviction. Counsel unwittingly made reference to Kenley's failure to testify and did not object to evidence regarding the deterrent effect of the death penalty introduced by the prosecution. Many similar events occurred (or failed to occur) at Kenley's noncapital trial. In addition, counsel made no closing argument and did not move for severance of charges (robbery, kidnapping, assault and theft). By the close of the noncapital trial, counsel had accepted a job with the prosecuting attorney's office.

The district court, applying the presumption of correctness, adopted the state court

findings regarding the Crownover, Manion and Parwatikar evidence. It characterized the evidence as "scant" mitigating evidence. Mem. Op. at 40. The district court ruled that Kenley had procedurally defaulted on a t least some part of twenty-five of his thirty-five claims for relief from the capital conviction and on two of his twelve claims for relief from the noncapital convictions. The court concluded cause and prejudice had not been demonstrated on any barred claims. Id. at 4. The district court determined the remaining claims were without merit after deferentially reviewing the state court fact findings and legal conclusions.

STANDARD OF REVIEW

Likewise, this court undertakes a deferential review when considering the factual findings of the state and district courts. As we have consistently said in recent decisions, we apply a presumption of correctness to state court findings of fact, we review claims of

ineffective assistance of counsel de novo as a mixed question of fact and law, and we only review those claims which were fairly presented first to the state courts and the federal district court, unless cause and prejudice or miscarriage of justice are shown sufficient to excuse default. See, e.g., Bolder v. Armontrout, 921 F.2d 1359, 1361 (8th Cir. 1990), reh'g denied, 928 F.2d 806 (8th Cir. 1991); Laws v. Armontrout, 863 F.2d 1377, 1831-82 (8th Cir. 1988) (en banc), cert. denied, 490 U.S. 1040 (1989).

PRELIMINARY ISSUES

The petition for habeas relief contained several different claims of ineffective assistance of counsel and other claims based on allegedly inadmissible evidence, incorrect jury procedures and instructions, and violation of the eighth amendment. Having reviewed the relevant opinions of the respective courts and the excerpts from state court filings contained in

the record, we affirm the district court's determination of procedural bar with regard to twelve of Kenley's claims.[1] These claims were not adequately presented to the state courts, and Kenley did to meet his burden of showing cause and prejudice or miscarriage of justice of justice. See Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).

As for the other claims determined to be in default by the district court, we find probative evidence in the record and in the text of the district court's memorandum opinion that suggests these issues may have been sufficiently presented to avoid default.[2] However,

---

[1]The twelve claims which we agree were defaulted are capital claims 8, 12 (supplement), 21, 24, 28, 29, 31, 32, 33 (part) and 34, and noncapital claims 10 and 12.

[2]Very clear examples of issues presented to the state courts but determined barred by the district court are capital claims 4 - 6 and

(Foo

notwithstanding this possibility, we conclude that all but two of these claims were either thoroughly and adequately addressed by the state courts, or were insufficient, separately and collectively, to justify habeas relief in light of the overwhelming evidence of guilt.[3] See Long v. Iowa, 920 F.2d 4, 6 n.2 (8th Cir. 1990) (at least where relief is denied, court may by-pass procedural bar and address the merits if it is the simpler issue). With respect to the claims denied by the district court on the merits,[4] we conclude that as to all but two of

---

(Footnote Continued)
35. Claims 4 - 6 assert that counsel's inexperience resulted in ineffectiveness. Claim 6e! of Kenley's Missouri post-conviction relief petition raises this precise issue. Mem. Op. at 9. Claim 35 asserts cruel and unusual punishment under the eighth amendment. The Missouri Supreme Court addressed this issue on direct appeal. Kenley, 693 S.W.2d at 83.

[3]The potentially barred claims we dispose of on other grounds are capital claims 3 - 7, 13, 16 - 17, 19, 22, 26, 30 and 35.

[4]The claims denied by the district court on

(Foot

these claims the district court did not err in applying the presumption of correctness to state court fact findings, and we do not disagree with its conclusions of law. The denied claims are simply insufficient to justify relief in light of the overwhelming evidence of guilt or are otherwise meritless.

Of the claims the district court denied on the merits, this leaves for our consideration capital claims 2 and 33. Claim 2 states that "trial counsel was ineffective at the punishment stage of petitioner's capital murder trial in that he failed to present the medical, psychological and psychiatric testimony and reports" of Crownover and Manion. Claim 33 asserts ineffectiveness for failing to present evidence of prior Farmington State Hospital admissions. We

---

(Footnote Continued)
the merits which we similarly deny are capital claims 9 - 12, 14 - 15, 18, 20, 23 and 25, and non-capital claims 1 - 9 and 11.

also consider capital claims 1 and 27 because excerpts from the state court filings quoted in the record and the text of the information considered by the state courts persuade us that these claims were adequately presented to the state courts to avoid procedural default. Furthermore, though stating the two claims were barred, the district court considered their merits to a great extent because of overlap with claims it considered on the merits.

PROCEDURAL DEFAULT

Claims 1 and 27 charge that counsel failed to present available mitigating witnesses during sentencing. In Kenley's pro se post-conviction relief petition, claim ¢b!, Kenley states "¢c!ounsel failed to present available mitigating evidence to the jury during the penalty phase portion of the trial," and then follows with nonexclusive examples of specific witnesses and reports, including "such witnesses and records documenting a mental condition of movant

which would have been admitted as mitigating circumstances both as to guilty ¢sic! and punishment." Mem. Op. at 9. In claim ¢c! Kenley states "¢c!ounsel failed to properly investigate movant's case," and refers to specific failures to pursue referenced leads contained in his social history. Id. In Kenley's brief on appeal from the denial of post-conviction relief, claim ¢1!, he states "counsel failed . . . to investigate and present such evidence in that counsel had access to lay and psychiatric evidence concerning Kenley's background, turbulent and abused family history, and psychiatric record ¢sic! including evidence that his condition could yet be improved (emphasis added)." Id. at 11-12.

The circuit court characterized Kenley's claim as "failure to produce mitigating evidence at the sentencing phase of the trial" and later as a general failure to produce mitigating evidence. Circuit Court Opinion at 1, 3. The

appeals court characterized Kenley's point of error broadly as a failure to investigate for and present mitigating psychiatric evidence. Kenley, 759 S.W.2d at 344. The district court similarly characterized the issue as counsel's decision to not further investigate and present mitigating psychiatric evidence. Mem. Op. at 38. The district court also mentioned counsel's investigation into "other information potentially relevant to mitigating circumstances," though it gave no details and made no findings regarding that investigation. Id. at 38.

The principal evidence which Kenley seeks to have us consider relating to the barred claims is unreviewed medical reports of Dr. Richards and from the military, and family testimony regarding Kenley's background and recent observations of his behavior and condition corroborative of his diagnosed psychiatric and substance abuse problems.

We have not applied an unreasonable standard when deciding whether habeas clams have been adequately presented to the state court. The same factual arguments and legal theories should be present in both the state and federal claims. Tippit v. Lockhart, 903 F.2d 552, 554 (8th Cir.), cert. denied, 111 S.Ct. 301 (1990). This means that the federal claim should not present significant additional facts such that the claim was not fairly presented to the state court. Stranghoener v. Black, 720 F.2d 1005, 1007-08 (8th Cir. 1983). We may review claims as long as they are closely related to claims presented to the lower courts, Guinan v. Armontrout, 909 F.2d 1224, 1226-27 (8th Cir. 1990), cert. denied, 111 S.Ct. 800 (1991), but we have required at least an "arguable factual commonality." See Bolder, 921 F.2d at 1364 n.9 (quoting Laws, 863 F.2d at 1387 n.10).

As stated, the failure to investigate and present expert and lay mitigating evidence of

Kenley's background and medical problems was raised by the filings in state court. The state courts discussed counsel's failure to present mitigating evidence and his decision not to investigate further. The district court considered these same issues. Mem. Op. at 38. the transcript of the post-conviction relief hearing contain admissions by Kenley and counsel that they discussed the topic of family witnesses. Dr. Parwatikar's report states that he contacted family witnesses. The records and reports considered by the courts documented the existence of Dr. Richards's report, Kenley's military service, names of family members familiar with Kenley's problems, and Kenley's substance abuse problems. Therefore, claims 1 and 27 were presented to the state courts and appear to be substantially based on the same facts and evidence as the two claims before us. Applying the stated standards to these facts, we conclude that claims 1 and 27, as they relate to the Dr. Richards and military reports, and to the family

testimonial evidence we mentioned, were properly presented to the state courts and our review is not barred.

INEFFECTIVE ASSISTANCE OF COUNSEL

Based on the preceding discussion, the precise issue before us is the question whether Kenley received ineffective assistance of counsel during the sentencing phase of his capital trial due to counsel's failure to present available family and expert mitigating evidence of his medical, psychological and psychiatric history. The primary evidence that Kenley relies upon for reversal is his social history, his pre-examination report, reports by Drs. Manion and Richards, his military record and family witness testimony.

Ineffectiveness during the guilt phase, though briefed by Kenley, is not now at issue. As we stated, many of his claims raising this issue were thoroughly and adequately addressed

by the state courts or were otherwise meritless. Some were defaulted and others were redundant. As to the guilt phase ineffectiveness claims reviewed by the district court, we do not opine as to whether counsel's performance failed to meet the minimum constitutional standard because we find no prejudice given the overwhelming evidence of guilt. this included the in-court testimony of seven eyewitnesses to the murder and the corroborating testimony of twenty-six total witnesses. See Strickland v. Washington, 466 U.S. 668, 697 (1984) (performance need not be evaluated if there is not prejudice).

To grant relief based on a claim of ineffective assistance of counsel, we must find (1) counsel's performance was constitutionally ineffective (performance test) and (2) the ineffective performance resulted in prejudice (prejudice test). Id. at 687. With the performance test, we start by presuming that counsel provided effective assistance, and we do not use

hindsight to question counsel's performance. Id. at 687-88.

With the prejudice test, we evaluate the outcome of the proceeding in question. The ineffective performance must create a reasonable probability that the result of the proceeding is unreliable; the ineffectiveness must undermine our confidence in the proceeding. Id. at 693-94. This means more than just a conceivable effect on the outcome but something less than the oft used "more likely than not" or preponderance standards. Id. In the context of a death sentence, we must determine the question whether, but for counsel's deficient performance, there is a reasonable probability the jury would have concluded the balance of the aggravating and mitigating circumstances did not warrant death. Id. at 695.

The Supreme Court requires that counsel make a reasonable investigation in the

preparation of a case or make a reasonable decision not to conduct a particular investigation. Id. at 691. Counsel's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment support the limitations on investigation. Id. at 690-91. We have also considered these principles in our circuit and have held that counsel must exercise reasonable diligence to produce exculpatory evidence and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel. Eldridge v. Atkins, 665 F.2d 228, 235-37 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982).[5] Failing to interview witnesses or discover

---

[5]"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty." Eldridge, 665 F.2d at 232 (citation omitted).

mitigating evidence relates to trial preparation and not trial strategy. Chambers v. Armontrout, 907 F.2d 825, 828 (8th Cir.) (en banc), cert. denied, 111 S.Ct. 369 (1990). Counsel's performance may be found ineffective if s/he performs little or no investigation. See, e.g., id. at 829-31 (counsel's failure to investigate enough to find substantial, available mitigating evidence is ineffective assistance); Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir. 1984) (counsel's reliance on medical report and interviews with defendant only was an inadequate investigation); Pickens v. Lockhart, 714 F.2d 1455, 1467 (8th Cir. 1983) (abdication of investigative duty is ineffective assistance of counsel). We have stated that failing to present mitigating evidence may be ineffective assistance if, due to inadequate trial preparation and investigation, "counsel has through neglect failed to discover such evidence . . . ." Laws, 863 F.2d at 1385.

A. Performance Test

Kenley contends that the Crownover, Manion and Parwatikar evidence, and his discussions with counsel, should have led counsel to further investigate for mitigating evidence. We must evaluate the reasonableness of counsel's decision not to investigate further in light of what he knew or should have known.

The state primarily focused on counsel's decision not to present any mitigating evidence rather than the decision not to investigate further, but it appears the same reasoning was relied upon for both analyses. In reaching the legal conclusion that counsel's decision was reasonable, the state court's relied on counsel's conclusions that available mitigating evidence was too insubstantial and too old, that Dr. Parwatikar's findings were conclusively non-mitigating, and that additional aggravating information would exceed mitigating information. The first two contentions we

address now; the third we save for our prejudice discussion. The district court concluded, without discussion, that counsel had conducted a thorough investigation and his decision not to investigate further was reasonable in light of the information he had. Mem. Op. at 41. We have some trouble with these unsupported conclusions.

The fact findings made by the state courts regarding the Crownover, Manion and Parwatikar evidence that were used to support their legal conclusions were fairly similar. The circuit court which held Kenley's state post-conviction proceeding concluded:

> The sum total of Mrs. Crownover's testimony would be that as a young boy between the ages of 11 years and 15 years, the defendant had been aggressive, hostile and not functioning in the classroom and as a result of such conduct, he had been expelled from school. The testimony of Dr. Manion would have been that as a teenager the defendant would go into a state of uncontrollable rage, that he was extremely defensive, difficult to work with, not

> communicative, expressed negative and hostile feelings toward his family, especially his father, that he had only really shown any improvement while on medication in an institutional situation.

Circuit Court Opinion at 3 - 4. The circuit court also concluded that "¢n!either Dr. Manion's nor Mrs. Crownover's testimony would conclusively show that the defendant was suffering from any mental disease or defect." Id. at 4. The appeals court reached a similar conclusion. Kenley, 759 S.W.2d at 347.

We think these fact findings are unfairly slanted against Kenley, are incomplete and are only partially supported by the record. We are therefore unable to deferentially and exclusively rely on them. In an attempt to justify counsel's decision, the state and district courts have trivialized the information contained and referred to in the Crownover and Manion records, characterizing it as "scant" mitigating evidence, and have further overstated the conclusiveness of Dr. Parwatikar's report. Most of

the mitigating information has been omitted from their fact findings. By way of supplement we offer additional facts adduced from the materials which wee available to counsel and the state courts to better reflect the true picture of mitigating and aggravating evidence reviewed by counsel.

Kenley was first treated at the Poplar Bluff, Missouri diagnostic center in 1971. He was next treated at the outpatient clinic of Farmington State Hospital in 1973, then again in 1975. The admissions appear to have been related to behavioral problems at home in school. Kenley was treated again at the Poplar Bluff diagnostic center in 1975 after he experienced fainting spells. From there he was sent to the Lutheran Medical Center where many of his medical problems were first documented. The records contain information on suicide attempts, abnormal tracing in Kenley's EEG which was considered "not conclusive of convulsive disorder," drug

use, anxiety and hostility. The records contain a reference to the fact Kenley was sleeping with a gun under his bed for fear of his father. His problem was diagnosed as a possible seizure disorder. The same year Kenley was first treated by Dr. Manion. In 1977 Kenley was treated by Dr. Richards at Farmington State Hospital and was also discharged from the military due to a suicide attempt. Names of family members appeared at various points in the reports and records with respect to incidents and interviews. This information was all referred to in one or more of Crownover's records, the pre-examination questionnaire, and Parwatikar's report.

Before Dr. Parwatikar's examination of Kenley, Crownover completed a pre-examination questionnaire. In that questionnaire and in her social history she documented Kenley's troubled home life and childhood, including the divorce of his parents, environmental instability, a

father with psychiatric problems who threatened Kenley on many occasions, and aggressive, sometimes violent behavior by Kenley. She also documented Kenley's alcohol problem, the prescription drug treatments, and that Kenley served in the military.

Dr. Manion's records document Kenley's report of his father's threats. They also document that Kenley's father had a chronic mental illness and was a continuing psychiatric outpatient. Dr. Manion concluded Kenley had an unsocialized behavior disorder and prescribed anti-depressants used for mental patients to try to normalize his behavior. The medication resulted in some improvement in Kenley's behavior, and Dr. Manion opined that with continued treatment Kenley "would be improved." Kenley's EEG was considered abnormal by Manion but was inconclusive of convulsive disorder.

After considering interviews with Kenley and other limited background information, Dr. Parwatikar performed intelligence, brain function and personality tests on Kenley. Parwatikar concluded Kenley had an anti-social personality disorder (based on personality test results), but was competent to stand trial and was not suffering from an exculpatory mental disease or defect. Dr. Parwatikar reached no diagnosis regarding the results of Kenley's intelligence and organic brain functioning tests, although his report notes some tests were inconclusive and inconsistent. The report also documents Kenley's alcohol and drug problems and two potential suicide attempts, one in the military and one drug overdose. The report documents one violent incident during Kenley's incarceration.

Only combined with our summary here would the findings of the state and district court even begin to portray an accurate picture of the

information which counsel reviewed. Counsel testified that he viewed the possible psychiatric and medical testimony as mitigating but felt it was simply too old and inadequate to overcome Dr. Parwatikar's conclusive findings. Counsel apparently missed the references in these materials to the more recent evidence of Dr. Richards' report and Kenley's military record. Each was more recent and more mitigating than Dr. Manion's report. Counsel should have been aware of these as they were clearly documented in one or more places in the information he considered.

The record before us contains Dr. Walker's 1977 report. It states that Kenley has "possible organicity" and suffers from an anti-social personality disorder. The report also documents Kenley's drug abuse and states that there is some indication of pathology possibly contributing to anxiety or schizoid thinking. The report documents an abnormal EEG which "suggests a possible convulsive disorder" and MMPI test results

with "peaks on the psychopathic deviate, manic and paranoid scales."

Kenley's military record documents a wrist slitting incident. The military medical records labeled the incident as both a "suicide gesture" and "suicide attempt." The medical evaluation was that Kenley had "suicidal tendencies" and a personality disorder. The record suggests Kenley attempted suicide as a way to get out of the military, as fact Kenley confirmed to Parwatikar. After the wrist slitting incident he was reassigned and was eventually discharged as unsuitable for military service.

Had counsel merely reviewed the information he had and requested the additional reports, he would have found additional documentation of Kenley's problems so as to bolster Manion's findings and further challenge the conclusiveness of Parwatikar's report. As it was, counsel only became aware of Kenley's history after

Crownover initiated contact with him. In fact, the only investigation initiated by counsel was his request for the prison psychiatric examination and his discussion with a non-examining doctor.

In addition to this expert evidence, certain family members had even more recent contact with Kenley and had continued to observe problems and behavior consistent with that documented by Manion, Richards and the military doctors. Family references were contained in Kenley's social history, some were allegedly contacted by Parwatikar, others were discussed with counsel, but none were contacted by counsel. Counsel testified, ant the State alleges, that family members were not contacted or called as witnesses because Kenley instructed counsel not to do so. The transcript excerpts in the record only clearly demonstrate that Kenley instructed

counsel not to call his father and grandmother.[6] Kenley's case is distinguishable from those where a defendant instructs counsel not to call certain witnesses and counsel has no way of knowing about other possible witnesses, Bolder, 921 F.2d at 1363-65, as well as those cases where witnesses were contacted, were not willing to testify favorably, or were unable to provide any material mitigating testimony. Id. (several witnesses contacted); Guinan, 909 F.2d at 1231 (family witnesses were not called but were interviewed); Stokes v. Armontrout, 851 F.2d 1085, 1095-96 (8th Cir. 1988) ("not enough to merely speculate that a tearful parent on the stand might evoke pity"), cert. denied, 408 U.S. 1019 (1989).

---

[6]After repeated questioning on this issue at his post-conviction hearing, Kenley once ambiguously responded in the affirmative to a question regarding his desire not to get family involved. However, Kenley stated numerous times that he only asked that his grandmother and father not be contacted as witnesses.

The affidavits included in the district court file contain statements by roughly a dozen family members further corroborating the facts of Kenley's disadvantaged childhood and his drinking problems, as well as his good qualities such as trustworthiness, work ethic, and so forth. Two of the affiants state they approached counsel with their willingness to provide information about Kenley and sympathetic testimony on Kenley's behalf at trial, but counsel declined. Several affiants also state they saw Kenley the morning after his arrest at the jail and that he was drunk. This fact is corroborated by articles based on witness accounts appearing in the Daily American Republic and a statement made by Sheriff Link of Butler County to counsel before trial that he saw Kenley in a tavern the afternoon before the crimes and that he had second-hand knowledge that Kenley purchased alcohol the night of the crimes.

Turning to counsel's other justification for not presenting available mitigating evidence, that Parwatikar's report was conclusively non-mitigating, if counsel would have reviewed the report closely, he would have found it not so conclusive after all. This is so even without regard to the additional undiscovered reports and witnesses. Parwatikar's report states that he based his findings on the examination he performed, the police report, records of Kenley's 1977 admission to Farmington State Hospital, and interviews with Kenley's family. However, Parwatikar's report contains no reference to Manion or her diagnosis, or to Richards whose 1977 report Parwatikar states he reviewed. The report also indicates Parwatikar knew of Kenley's military record through discussions with Kenley, not from having reviewed the record itself. Parwatikar's report states family was contacted, but no names are listed, no affiants have stated as much, and the record contains no evidence of such contact. The report is

inconclusive in two of the three test categories of the examination and Parwatikar's personality diagnosis is not inconsistent with prior diagnoses.

Due to the omissions and incomplete test results, Parwatikar's report can hardly be said to be conclusively non-mitigating. An incomplete or inconclusive report does not obviate the possible significance of older evidence just because it is more recent. Thomas, 738 F.2d at 309 (such a report only found to somewhat reduce the probability of prejudice). The Thomas decision has other similarities to the present case. Thomas's counsel relied solely on his interviews with Thomas and his review of defendant's social history. Thomas had been in the mental hospital on five different occasions, had attempted to overdose on drugs, and was a psychiatric outpatient. This court found ineffective assistance of counsel due to inadequate investigation. Id. at 308. Kenley's counsel did not do much more

than Thomas's counsel, yet Kenley's background was more substantial and better documented.

The fact that Parwatikar's report rules out a mental disease or defect and incompetency does not mean it rules out lesser but potentially mitigating conditions and disorders. We are aware of no legal authority strictly limiting mitigating medical, psychiatric and psychological evidence to that of legal insanity or incompetence. In fact, evidence of conditions, disorders and disturbances are precisely the kinds of facts which may be considered by a jury as mitigating evidence. See Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982).

None of the information we have discussed was hidden from counsel. References were made to it or it was brought to his attention in the course of his review of materials and his representation of Kenley. We believe that the evidence considered by counsel, along with the

evidence that would have been discovered through further investigation, contained much potentially mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393, 398 (1987) (evidence consisting of family testimony, troubled and difficult background, prior criminal history or lack thereof, and prospects for rehabilitation are all admissible as mitigating evidence); Eddings, 455 U.S. at 113-16 (facts about family background, personal history, emotional disorders, age, emotional disturbance, beatings by one's father, and slow mental development are admissible mitigating evidence). Thus, this case may be distinguished from one like Laws where the court found that defendant's records revealed no mitigating medical or psychiatric problems.

When counsel makes a decision not to further investigate, that decision is only reasonable to the extent professional judgment makes the limitations placed on further investigation reasonable in the circumstances. Strickland, 466

U.S. at 690-91. We will not fault a reasonable strategy not to investigate further if it is based on sound assumptions. Pickens, 714 F.2d at 1467. Here it was not a reasonable strategy that led counsel not to investigate, but lack of thoroughness and preparation. "Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." Chambers, 907 F.2d at 835 (quoting United States v. Gray, 878 F.2d 702, 711 (3rd Cir. 1989)).

In sum, the state court fact findings were incomplete and counsel's decision to stop investigating was unreasonable because his belief that mitigating evidence was too old and insubstantial resulted from his failure to follow available leads to more recent and persuasive mitigating evidence. counsel's investigation fell short of what was required in this case. We also feel counsel unreasonably concluded

Parwatikar's report was conclusively non-mitigating because the report itself was incomplete, often inconclusive, and did to rule out the possibility of mitigating evidence of disorders, conditions and disturbances.

B. Prejudice Test

Having found counsel's performance deficient for failing to further investigate available and potentially mitigating evidence, we must now decide whether counsel's performance prejudiced Kenley. The standard by which we judge prejudice is whether we find a reasonable probability that the outcome of the sentencing proceeding would have been different but for counsel's ineffectiveness. A reasonable probability is one sufficient to undermine our confidence in the outcome of the proceeding. We believe there is a reasonable probability Kenley would not have received a death sentence if some of the mitigating evidence had been presented.

The state courts and district court concluded as a matter of law that there was no prejudice because the mitigating evidence was "scant" and the aggravating evidence would have been more damaging. We have demonstrated that the state court fact finding was not supported by the record because the potential mitigating evidence was substantial. We do not agree as a matter of law that there was no prejudice because the other evidence would have significantly worsened the perception of Kenley's character. Rather, we believe the testimony would have put the aggravating evidence in context along with the mitigating evidence.

The state courts' conclusion on this issue was based on counsel's beliefs that the mitigating evidence would be unpersuasive to a jury in light of Dr. Parwatikar's report and additional potentially aggravating information. We do not believe reasonably effective counsel would have reached the same conclusion if, in addition to

reviewing Crownover's records, counsel would have interviewed Dr. Manion and Dr. Richards or at least reviewed their reports, reviewed Kenley's military file, and interviewed family witnesses concerning Kenley's history and his condition the morning after arrest. This additional information would have been more than enough to mount a challenge to Parwatikar's report. The medical evidence of Kenley's condition may fall short of a mental disease or defect diagnosis but it is more tan just the borderline non-severe personality disorder we found in Smith v. Armontrout, 888 F.2d 530, 534 (8th Cir. 1989), and is more akin to an extreme personality or emotional disorder or disturbance. Cf. Strickland, 466 U.S. at 700 (at most evidence showed defendant was generally a good person, under a lot of stress, but not suffering from an extreme disturbance of any kind). Also, Kenley's alcohol problems were well documented by all doctors, and when combined with other evidence from the sheriff, news accounts and

family testimony, would have been probative mitigating evidence of intoxication.

With regard to the potential for additional aggravating information, the most damning information in Parwatikar's report is the determination that Kenley was not insane or incompetent. As stated, as far as we are aware, such conditions are not prerequisites to information being considered mitigating evidence. See Eddings, 455 U.S. at 114-15; Hayes v. Lockhart, 852 F.2d 339, 349 (8th Cir. 1988) (psychiatric report stating defendant did not have mental disease or defect but documenting alcohol problem and anti-social personality disorder admitted as mitigating evidence), rev'd on other grounds, 491 U.S. 902 (1989).

The other potentially damaging information consists principally of Kenley's anti-social behavior, violence and arrests (not convictions) when he was a minor. His sole conviction was

already in evidence. Had all the reports been introduced into evidence and had all affiants and doctors testified, we do not deny the jury would have heard aggravating information. After conducting a reasonable investigation, counsel may conclude that the introduction of the mitigating evidence "would barely have altered the sentencing profile presented", Strickland, 466 U.S. at 700, or that harmful information is greater than potential helpful information, and choose not to present certain evidence. Burger v. Kemp, 483 U.S. 776, 789-91 (1987); Guinan, 909 F.2d at 1231. In this case we have concluded counsel did not conduct a reasonable investigation. But even if he had, in the context of what the jury had already heard at trial about Kenley's crazed and violent actions on the night of the crimes, we are doubtful that much of the additional aggravating information would have had any significant incremental aggravating effect on the jury. Furthermore, the aggravating

information was mostly cumulative. Chambers, 907 F.2d at 829-30.

Given the sympathetic light in which Kenley's past behavior could have been presented, in the context of his family and medical background by Crownover and family affiants, given the significant evidence of medially significant conditions and disorders, suicidal tendencies, alcohol abuse and intoxication, and the prospects for successful treatment, we believe it was unreasonable for counsel to have presented no mitigating evidence.

Reasonable counsel might have been somewhat selective in his evidence presentation, but would not have cast aside all the mitigating evidence in this case. See Guinan, 909 F.2d at 1229 (after thoroughly reviewing all medical and psychiatric records, counsel requested a second psychiatric opinion); Smith v. Armontrout, 888 F.2d at 535 (decision by counsel to offer a

mitigating circumstance, "support it with expert testimony, but leave out documents that would at best have brought some additional increment of support for the diagnosis, while also carrying a substantial risk" of making things worse, not unreasonable); Hayes, 852 F.2d at 348-51 (counsel not ineffective for introducing only part of medical and psychological evidence where counsel conducted a thorough investigation, did introduce evidence of alcohol problems and treatment prospects, called live witnesses, and introduced psychiatric report into evidence). For the reasons stated, we find prejudice.

CONCLUSION

The State argues and the district court infers that recent case authority in our circuit does not support the legal conclusions we reach in this case, and suggests our existing authority creates an almost insurmountable barrier to habeas relief. We disagree with this general characterization of our case authorities

although, as a practical matter, the strong presumption in favor of counsel and the heavy burden on the defendant established by the Supreme Court in Strickland means determinations of ineffective assistance of counsel such as in the present case will likely occur infrequently.

Having found deficient performance and prejudice in the sentencing phase of the present case, we conclude counsel was ineffective. We therefore reverse so much of the judgment of the district court as denied the writ with respect to the death sentence and remand this case to the district court with instructions that the State of Missouri be required to vacate Kenley's death sentence and either reduce it to a life sentence without parole or conduct a new sentencing procedure within one hundred eighty days from and after the issuance of the district court's order. See Mo. Stat. Ann. Section 565.035 (5)(2) - (3) (1983).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KENNETH L. KENLEY,	)	
	)	
Petitioner,	)	
v.	)	No. 88-2298C(3)
	)	
BILL ARMONTROUT,	)	
	)	
Respondent.	)	

MEMORANDUM

This matter is before the Court on the petition of Kenneth Lee Kenley for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

In June 1984, petitioner was convicted of capital murder in the January 1984 death of Ronald Felts. The jury recommended the death penalty and petitioner was sentenced accordingly. On direct appeal, the Missouri Supreme Court affirmed the conviction and sentence. State v. Kenley, 693 S.W.2d 79 (Mo. banc 1985), cert. denied, 475 U.S. 1098 (1986). Thereafter, petitioner filed in state court a request for relief under then-effective Missouri Supreme Court Rule 27.26. After an evidentiary hearing, the trial

court made findings of fact and conclusions of law, and entered judgment denying the request for relief under Rule 27.26. The Missouri Court of Appeals affirmed that ruling. Kenley v. State, 759 S.W.2d 340 (Mo. App. 1988).

On November 30, 1988, petitioner filed in this Court his original pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner's appointed counsel subsequently filed an amended petition.

Now before the Court are some thirty-five claims for federal habeas relief based on alleged violations of federal constitutional guarantees to effective assistance of counsel, and of the sixth and eighth amendments to the United States Constitution.

With respect to most of petitioner's claims, respondent generally urges either (1) the claims are barred from consideration by this Court absent a showing of cause and prejudice pursuant to Wainwright v. Sykes, 433 U.S. 72, 81-91 (1977), and neither "cause" nor

"prejudice" exists as to those claims; or (2) the claims are without merit, and petitioner's convictions and sentence should be upheld on the present record.

Ordinarily, a federal court reviewing a state conviction in a 28 U.S.C. § 2254 proceeding may consider only those claims which the petitioner has presented to the state court in accordance with state procedural rules. See Engle v. Isaac, 456 U.S. 107, 125, 135 (1982). This requirement involves consideration of both the question whether the petitioner has exhausted all remedies available in the courts of the state, see Humphrey v. Cady, 405 U.S. 504, 516 (1972), and whether he has preserved his claims for federal habeas corpus review by complying with state procedural rules governing their presentation. Engle, supra, 456 U.S. at 124-25, 125-26 n. 28.

A review of the record reflects that petitioner has no presently available state remedies. It seems, therefore, that he has satisfied

the exhaustion requirement. Additionally, the parties do not now contend there are any state remedies presently available for the consideration of any of petitioner's claims. Thus, the exhaustion requirement has been met. The Court must determine whether all of petitioner's claims were properly presented to the state courts.

Where a Federal habeas petitioner raises "contentions of federal law which were not resolved on the merits in the state proceeding due to [petitioner's] failure to raise them there as required by state procedure," the federal court may not address the merits of those claims absent a satisfactory showing of "cause" and "prejudice." Wainwright, supra, 433 U.S. at 87 (emphasis in original). In particular, before addressing the merits of any such claims, this Court must find that (a) petitioner has established adequate cause for his failure to present such claim(s) and, if so, (b) that there was actual prejudice to petitioner as a result of

the state court's failure to address those claims.[1] Worthan v. Wyrick, 805 F.2d 303, 305

---

[1]The cause and prejudice showing is necessary to override petitioner's procedural default except "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986). See also Engle, supra, 456 U.S. at 35 (in appropriate cases, the cause and prejudice showing "must yield to the imperative of correcting a fundamentally unjust incarceration"); cf. Smith v. Murray, 477 U.S. 527, 538-39 (1986) ("there is [nothing] 'fundamentally unfair' about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination.")

Here, the record does not support any contention that petitioner is "actually innocent" of the murder charge, or that the state trial court proceedings ended in a "fundamentally unjust" result. The record establishes petitioner embarked upon a crime spree in the late hours of January 3 and the early hours of January 4, 1984. During his crime spree, petitioner shot and killed one patron of a lounge, robbed a liquor store, a motel, and a lounge, kidnapped two women, shot and wounded a bartender and a kidnap hostage, and attempted to sexually assault his kidnap hostages. Accordingly, the Court will address the cause and prejudice tests with respect to each claim respondent contends is barred by petitioner's failure properly to present the claim(s) to the state courts.

(8th Cir. 1986), cert. denied, 481 U.S. 1019 (1987); Parton v. Wyrick, 614 F.2d 154, 157 (8th Cir.), cert. denied, 449 U.S. 846 (1980). This test applies whether the failure properly to present the claim(s) to the state courts results from conduct by petitioner's counsel, see, e.g., Wainwright, supra, or from conduct by petitioner proceeding pro se, Vasquez v. Lockhart, 867 F.2d 1056, 1057-58 (8th Cir. 1988), cert. denied, 57 U.S.L.W. 3792 (U.S. June 5, 1989)(No. 88-6481); Smith v. Lockhart, 843 F.2d 295, 298 (8th Cir. 1988). Where cause is not established, the Court does not need to examine whether petitioner suffered "actual prejudice," Engle, supra, 456 U.S. at 134 n.43; **Stokes** v. Armontrout, 851 F.2d 1085, 1093 (8th Cir. 1988), cert. denied, 109 S.Ct. 823 (1989). Similarly, where there is no prejudice to petitioner, the Court need not address the "cause" element. United States v. Frady, 456 U.S. 152, 168 (1982).

Missouri procedure requires the presentation of a constitutional claim "be made at the

first opportunity and preserved at each step of the judicial process." Benson v. State, 611 S.W.2d 538, 541 (Mo. App. 1980). In a jury-tried criminal case, such as petitioner's, this principle requires:

(1) a contemporaneous objection where necessary during the course of trial, see State v. Kenner, 648 S.W.2d 552, 554 (Mo. App. 1983)(no appellate review of alleged error in examination of witness was preserved where a timely objection was not made during trial); State v. Hayes, 624 S.W.2d 16, 20 (Mo. 1981)(objection and proper request for relief is necessary to preserve appellate review regarding closing argument), and, if appropriate, an offer of proof, State v. Dixon, 655 S.W.2d 547, 555 (Mo. App. 1983), cert. denied, 464 U.S. 1072 (1984);

(2) inclusion of any allegation of error in a motion for new trial, Mo. R. Cr. P. 29.11(d) and 28.03, State v. McGowan, 636 S.W.2d 354, 357-58 (Mo. App. 1982)(appellate review is

limited to grounds asserted in motion for new trial);

(3) proper briefing of an alleged error on appeal, Mo. R. Cr. P. 30.20, State v. Gilmore, 617 S.W.2d 581, 582 (Mo. App. 1981);

(4) where appropriate, a post-conviction motion under Mo. S. Ct. R. 29.15 (previously Mo. Mo. S. Ct. R. 27.26); and

(5) appeal therefrom, Gilmore, supra, 861 F.2d at 1065-66 and 1065 n.9; Stokes, supra, 851 F.2d at 1092.

Based upon petitioner's failure to assert them at trial, to include them in his motion for new trial, to brief them on appeal, or to pursue them in petitioner's post-conviction proceedings, respondent contends petitioner is barred from suhmitting to this Court, in whole or in part, some twenty-eight of petitioner's thirty-five claims. Petitioner generally asserts that "the procedural default rule can be avoided if a fundamental miscarriage of justice has occurred where 'the alleged error undermined the

accuracy of the guilt or sentencing determination."' Smith, supra, 477 U.S. at 539.

Upon reviewing the available record, the Court concurs with respondent and finds the following claims barred from further consideration, absent a satisfactory showing by petitioner of cause and prejudice:

Claims in petitioner's amended petition designated as numbers 1, 3, 4, 5, 6, 7, 8, supplement to 12, 13, 16, 17, 19, 21, 22, 24, 26, 27, 28, 29, 30, 31, 32, 33 (except with respect to the extent this claim is the same as the claim covered in number 2), 34, and 35.

The only potential "cause" petitioner asserts in light of his failure properly to present the claims to the state courts is the alleged ineffective assistance of his state court trial and appellate counsel.

In Murray v. Carrier, supra, the United States Supreme Court noted that, with respect to procedural defaults during trial or in raising claims on appeal,

> the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see Reed v . Ross, 468 U.S. [1,] 16 [(1984)], or that "some interference by officials," Brown v. Allen, 344 U.S. 443, 486 (1953), made compliance impracticable, would constitute cause under this standard.
>
> Similarly, if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not "conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance." Cuyler v. Sullivan, 446 U.S. 335, 344 (1980). Ineffective assistance of counsel, then, is cause for a procedural default.

Carrier, supra, 477 U.S. at 488. The "cause" requirement is not established, however, by "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it." Id. at 486. Furthermore, the ineffective assistance of

counsel claim must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." Id. at 489; Wright v. Lockhart, 854 S.W.2d 309, 311 (8th Cir. 1988); Smittie v. Lockhart, 843 S.W.2d 295, 298 (8th Cir. 1988); see also Leggins v. Lockhart, 822 F.2d 764, 768 n.5 (8th Cir. 1987)(noting an ineffective assistance of counsel claim must be presented to the state courts "as an independent claim before it may be used to establish cause for a procedural default or denominated as a ground for habeas relief"), cert. denied, 108 S.Ct. 1080 (1988).

Having reviewed the available record, the Court finds the alleged ineffective assistance of counsel may not constitute cause for petitioner's failure to pursue before the state courts the above-noted claims because that alleged ineffective assistance of counsel was not presented to the state courts. In the direct appeal from his conviction, petitioner did not allege ineffective assistance of trial counsel

in any respect. In his post-conviction motion, petitioner asserted the following as ineffective assistance of counsel:

> [a] Counsel did not professionally conduct a probing and proper voir dire of the jury panel. ie. [sic], counsel failed to ask the jury panel the most basic questions concerning their views as to the imposition of the death penalty; for example:
>
> 1. Who would automatically impose a death sentence after you made a determination that a person deliberately killed?
>
> [b] Counsel failed to present available mitigating evidence to the jury during the penalty phase portion of the trial. ie. [sic], counsel failed to call Lois Crownover, Dr. Maria Manion as witnesses in movant's case or present records from the Lutheran Medical Center; such witnesses and records documenting a mental condition of movant which would have been admitted as mitigating circumstances both as to guilty [sic] and punishment.
>
> [c] Counsel failed to properly investigate movant's case. Counsel specifically failed to:
>
> 1. Follow up on information provided by Mrs. Lois Crownover, a school social worker with the Poplar Bluff Public Schools wherein Mrs. Crownover submitted documentation to counsel suggesting that movant had been seen and treated by certain physicians for a mental disorder or

problem/condition.

2. Contact Dr. Maria Manion and determine movant's condition that was diagnosed and treated by Dr. Manion.

3. Contact Lutheran Medical Center and obtain their records for purpose of documenting movant's mental condition.

[d] Counsel failed to properly object to the introduction of evidence of other crimes. ie. [sic], Mr. Rhew filed motions to prohibit introduction of such evidence prior to trial. The court invited Mr. Rhew to make specific objections to such evidence offered at trial; still Mr. Rhew made no such objections. Even the Appellate Courts at 693 S.W.2d. 79, 81 commented that no objections were made to evidence of other crimes.

[e] Counsel could not have provided competent and professional representation to movant as counsel prior to this trial had only been licensed to practice law for approximately one year, had only one prior jury trial previous to movant's trial, had never tried a murder case, let alone a case where the death penalty was being sought and did not have a second attorney assist him with the difficult aspects of a capital murder trial.

[f] Counsel failed and refused to petition the trial Court to fully and correctly instruct the jury on all lessor included offenses of the crime of Capital murder, i.e. First degree Felony murder and Second degree Felony murder, when said instructions were clearly supported by the evidence.

[g] Counsel failed and refused to object to the trial Court's failure to correctly instruct the jury at each recess, i.e. the giving of MAI-Cr-2d 1.08.

[h] Counsel failed and refused to object to the trial court's imposing sentence upon Movant at the close of all evidence on the grounds that the State had failed to prove venue and jurisdiction.

lil Counsel failed and refused to object to the State displaying a deadly weapon to the jury that was not fully and correctly indetified [sic] as being the same weapon that was allegedly used in the crimes charged.

[j] Counsel failed and refused to conduct a reasonable investigation into the plea-agreement the State had reached with Mr. Peal. Had counsel conducted a reasonable investigation Counsel would have learned that the State had made a deal with Mr. Peal not to prosecute him for selling stolen property in exchange for his testimony against Movant.

[k] Counsel rendered ineffective assistance when Counsel stated in open Court and before the jury that Movant was present at the crime scene. This action denied Movant due process in that said statement was the equivelant [sic] of pleading Movant guilty.

[l] Counsel failed and refused to object to the State presenting evidence of other crimes that Movant was allegedly involved in on the grounds that said evidence denied Movant due process and equal protection of the law.

> [m] Counsel failed and refused to object to the State being allowed to present closing argument first with Movant's Counsel arguing second in the punishment stage of the trial. This denied Movant's Counsel the right to present opening and closing arguments.
>
> [n] Counsel failed and refused to petition the Court to fully and correctly instruct the jury as to the use the jury could make of evidence of other crimes that Movant was allegedly involved in, i.e. to instruct the jury that this evidence could not be used or considered as evidence of Movant's guilt, but could only be considered for such purpose as said evicence [sic] was admitted.
>
> [o] Counsel knowingly proceed [sic] to represent Movant knowing that there was a real conflict of interest between Movant and counsel because Counsel had sought and secured employment with the Prosecuting attorney's Office.
>
> [p] Counsel failed and refused to object to the Court compelling Movant to appear before the Jury while in hand-cuffs.

On appeal from denial of his post-conviction motion, the only ineffective assistance of counsel claims pursued by petitioner were the following:

> [1] The trial court erred in denying appellant's Rule 27.26 motion on the issue of mitigating evidence because counsel failed in his Sixth Amendment duty to investigate and present such

evidence in that counsel had access to lay and psychiatric evidence concerning appellant's genetic background, turbulent and abused family history, and psychiatric record including evidence that his condition could yet be improved. Appellant was prejudiced in that the killing was sudden, the only two aggravating circumstances concerned the circumstances of the crime itself, and evidence of his life history could reasonably probably have resulted in a life sentence.

[2] The trial court clearly erred in denying appellant's 27.26 motion as to both the guilt and punishment phases of his capital trial because his attorney's inexperience manifested itself in ineffective assistance of counsel in that he conducted only the most cursory and ineffectual cross-examination of a handful of the state's witnesses, failed to test the eyewitness identifications or point out the inadequacies in the witnesses' descriptions of the cars involved, failed adequately to develop the evidence militating against a finding of deliberation; made a perfunctory and futile closing argument, and failed to object to inadmissible testimony by the widow and of appellant's possession of numerous unrelated handguns.

[3] The trial court erred in not finding that counsel was ineffective during voir dire in appellant's capital murder trial because the record shows that counsel failed in his duty to secure appellant a

> jury able to consider a life sentence and impartially to consider the guilt phase issues in that he failed to inquire of the jurors if they could consider a life sentence, made no attempt to rehabilitate jurors who had been disqualified as opponents of the death penalty, and failed to inquire about such issues as the juror's ability to follow the presumption of innocence and burden of proof.
>
> [4] The trial court clearly erred in refusing to vacate appellant's death sentence because he was rendered ineffective assistance of counsel at the punishment phase of trial in that counsel failed to submit or argue the statutory mitigating circumstance of no significant prior criminal history though appellant had only one prior conviction for stealing; failed to object to the state's argument that a report, which was not in evidence, showed the death penalty to be a deterrent to crime; and in his own argument made a direct reference to appellant's failure to testify.

Thus, these are the only claims of ineffective assistance of counsel that were adequately presented in the state court postconviction proceeding. Accordingly, since petitioner's present ineffective assistance of counsel claims were

not presented to the state courts, they may not constitute "cause" for purposes of the Wainwright test.

Additionally, this Court notes petitioner would be unable to demonstrate as "cause" the ineffective assistance of his trial or appellate counsel. The "cause" necessary to overcome the procedural bar is "cause" that would be in itself an independent ground justifying federal habeas relief. See Carrier, supra, 477 U.S. at 485-89; Leggins, supra, 822 F.2d at 768 n. 5. A claim of ineffective assistance of counsel in postconviction proceedings is not an independent ground for federal habeas relief. Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir.), cert. denied, 469 U.S. 823 (1984); Williams v. Missouri, 640 F.2d 140, 143-44 (8th Cir.), cert. denied, 451 U.S. 990 (1981). Thus, the ineffectiveness of counsel in petitioner's trial and appellate proceedings may not constitute "cause" to overcome a procedural bar.

Having found petitioner has not established "cause" for his failure properly to present to the state courts the above-noted claims, the Court will not address any actual prejudice resulting from any such failure, see Engle, supra, 456 U.S. at 134 n.43; Stokes, supra, 851 F.2d at 1093, and will not consider the merits of those claims.

The Court will now consider the merits of petitioner's remaining claims. In particular, petitioner alleges trial counsel was ineffective (1) in conducting a cursory and ineffectual cross-examination of a handful of the state's witnesses (designated as petitioner's ninth claim); (2) in failing to challenge the eyewitness identifications as presented by the state's witnesses (designated as petitioner's tenth claim); (3) in failing to point out and argue inadequacies in the descriptions of various vehicles involved as presented by the state's witnesses (designated as petitioner's eleventh claim); (4) in failing to develop evidence

militating against deliberation (designated as petitioner's twelfth claim); (5) in failing to object, during the guilt/innocence stage of the trial, to the testimony of the decedent's widow that the decedent had two children (designated as petitioner's fourteenth claim); (6) in failing to object to testimony regarding numerous unrelated handguns in possession of petitioner (designated as petitioner's fifteenth claim); (7) during voir dire, in failing to question the jury panel whether they would automatically impose a sentence of death after a finding of capital murder, i.e., trial counsel failed to "reverse Witherspoon" (designated as petitioner's eighteenth claim); (8) during the punishment stage of the trial, in failing to submit and argue as a mitigating factor that petitioner had no significant history of prior criminal activity (designated as petitioner's twentieth claim); (9) during the punishment stage of the trial, in failing to object to the prosecutor's argument which referred to a report which the

prosecutor had read which indicated the death penalty was a deterrent to crime (said report had not been admitted into evidence)(designated as petitioner's twenty-third claim); (10) during his own closing argument in the punishment stage of the trial, counsel made a direct reference to petitioner's failure to testify (designated as petitioner's twenty-fifth claim); and (11) at the punishment stage of petitioner's capital murder trial, by failing to investigate and possibly present to the jury any possible mitigating evidence on petitioner's behalf concerning the medical, psychological, and psychiatric testimony and reports of psychiatric social worker, Lois Crownover, and child psychiatrist, Dr. Maria Manion, both of whom previously treated petitioner (designated as petitioner's second and thirty-third claims).

In construing the constitutional requirement for effective assistance of counsel, the "benchmark . . . must be whether counsel's conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). The Court determines whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defense. Id. at 687. In analyzing counsel's performance, the Court must determine whether, under all the circumstances, the "identified acts or omissions were outside the range of professionally competent assistance." Id. at 690. This review is highly deferential for there is a strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance; that is, the petitioner must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy."' Id. at 689. With respect to the duty to investigate, the Supreme Court stated:

> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision

> that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 691.

A deficient performance alone is insufficient to find counsel was ineffective. The Court must also find prejudice resulted from such performance. To establish the prejudice element, petitioner must show

> there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

Id. at 694, 695. In making this determination, the Court "must consider the totality of the evidence before the judge or jury." Id. at 695.

Petitioner alleges that his trial counsel was ineffective because counsel failed to cross-examine the state's witnesses. Specifically, twenty-six witnesses testified on behalf of the state, and trial counsel elected not to crossexamine eighteen of the witnesses; and of the remaining eight witnesses, trial counsel asked a total of thirty-six questions on cross-examination.

The Rule 27.26 trial court considered this claim and held:

> Movant's complaint that counsel failed to cross-examine witnesses is not supported by any evidence that the testimony of those witnesses would have produced any inconsistencies, contradictions or other items of impeachment of value to the defendant's case. As noted above, the defendant has the burden of showing prejudice.

The Missouri Court of Appeals also made findings concerning this claim on petitioner's appeal to the court from the denial of his 27.26 motion, by stating:

> Appellant complains that

> the attorney cross-examined only eight of the state's twenty-six witnesses. At the hearing, the attorney explained his rationale was not to give the witnesses a chance to repeat their specific identifications and accounts of the events of the night. Appellant challenges the attorney's lack of ferocity in attacking the few inconsistencies in the witnesses' testimonies; to-wit: two of the six eyewitnesses to the murder remember appellant saying he would make "an example" out of them, in addition to consistently testifying to all other words spoken by the appellant; and the witnesses identified the cars driven by appellant in "vague" terms; and one witness only "thought" she could identify appellant.
>
> The attorney explained at the motion hearing that he did not want to give any witness a chance to repeat damaging testimony. In any event, "the extent of cross-examination and the subjects covered must in virtually every case be left to the judgment of counsel." Atkins v. State, 741 S.W.2d 729, 731 (Mo. App. 1987), quoting Williams v. State, 712 S.W.2d 404, 409 (Mo. App. 1986).

Kenley, **supra**, 759 S.W.2d at 349. The above factual findings underlying counsel's performance by the Missouri courts are entitled to the

presumption of correctness in the related federal habeas proceeding established in 28 U.S.C. § 2254(d) unless certain exigencies exist. Sumner v. Mata, 449 U.S. 539 (1981). While such a presumption attaches to any facts underlying an ineffective assistance of counsel claim, it does not apply to the state court's ultimate conclusion about whether or not petitioner's counsel rendered effective assistance. Strickland, supra, 466 U.S. at 698. Petitioner does not contend any circumstance precludes the application of the presumption of correctness, and this Court finds the state courts' findings supported by the record. Upon careful consideration of the record, the Court finds reasonable trial counsel's conduct in not further cross-examining the witnesses at issue here, and trial counsel's performance was not deficient. Trial counsel strategically decided that further cross-examination of the state's witnesses would only emphasize and enable the witnesses to repeat their damaging testimony. Since the Court has not

found petitioner's trial counsel's performance deficient with respect to his conduct on cross-examination, the Court need not and will not address the prejudice prong of the Strickland test for constitutionally ineffective assistance of counsel.

Petitioner next alleges that trial counsel was ineffective in failing to challenge the eyewitness identifications as presented by the state's witnesses, and in failing to point out and argue inadequacies in the descriptions of various vehicles involved as presented by the state's witnesses.

In reviewing these claims, the Missouri Court of Appeals found the claims to be without merit by stating:

> Additionally, although every eyewitness testifying identified appellant unequivocally, except for one witness, appellant contends that he was deprived of effective assistance of counsel in the attorney's failure to impeach that one witness on her "equivocal" identification. The trial transcript reads:

Q: Can you identify the man that had the gun that evening?

A: I think so. Yes. Yes.

Q: Did you see him well enough that you can point him out to the jury?

A: Yes.

Q: Do you see him in the courtroom today?

A: Yes.

Q: Would you point out that man for the jury please?

A: It's the man sitting over there.

Q: Are you indicating the man with the blue shirt seated to the left of [appellant's attorney]?

A: Yes.

The record does show that, even in the face of overwhelming and accurate identifications, the attorney did attempt to undermine the identification testimony by questioning the lighting in the bar that night.

Appellant alleges the following were "vague" descriptions of the cars he drove during his escapade: "a Ford station wagon . . .

> [b]rown and white . . . an older car", "Brown station wagon . . . in its seventies"; "brown Ford station wagon . . . '67 model"; "1973 Ford Ranch Wagon . . . bronze or brown or similar to that"; and with respect to the car appellant took from a patron of the Blue Moon, "'73 Ford Torino"; "gold Torino, Ford". These car descriptions are not vague nor are they necessarily inconsistent, particularly considering the independent basis of each witness' testimony.
>
> There is no merit to these accusations. The question of impeaching a witness is a matter of trial technique and strategy and cannot be the basis of a breach of duty toward appellant. Jackson v. State, 540 S.W.2d 616, 617 (Mo. App. 1976). Moreover, we find these "inconsistencies" minor at best and agree with the hearing court that appellant has not shown how he was prejudiced by not impeaching these witnesses. See Hurd v. State, 637 S.W.2d 809, 811 (Mo. App. 1982).

Kenley, supra, 759 S.W.2d at 349. Once again, the factual findings of the Missouri Court of Appeals are entitled to the presumption of

correctness established in 28 U.S.C. § 2254(d), and petitioner does not contend any circumstance precludes the application of the presumption of correctness. The Court finds the state court's findings supported by the record, and consequently the Court finds trial counsel's conduct reasonable in not further challenging the eyewitnesses' identifications of petitioner as the murderer, pointing out and arguing inadequacies in the descriptions of the various vehicles involved, and trial counsel's performance was not deficient. Trial counsel strategically decided not to pursue and have repeated this line of damaging testimony. Since the Court has not found petitioner's trial counsel's performance deficient with respect to his conduct at issue here, the Court need not and will not address the prejudice prong of the Strickland test for constitutionally ineffective assistance of counsel.

Petitioner also alleges that trial counsel was ineffective by failing to develop evidence

militating against deliberation. In particular, petitioner asserts that trial counsel failed to develop evidence and to raise a reasonable doubt that petitioner's actions were impulsive, and his ability to premeditate was affected on the day in question by intoxication and/or drugged condition preventing him from acting purposely or with knowledge.

In order for an act to be done with deliberation,

> it must be performed in a cool and deliberate state of mind. A finding of this element does not depend upon the time involved as much as it does upon an inference reasonably drawn from the evidence and circumstances surrounding the act. State v. Nelson, 514 S.W.2d 581 (Mo. 1974). Premeditation is thought beforehand of any length of time, however short. State v. Smart, 485 S.W.2d 90 (Mo. 1972).

State v. Wood, 596 S.W.2d 394, 400 (Mo. banc 1980). The element of deliberation mandates that petitioner coolly and fully reflected on his act. State v. Newlon, 627 S.W.2d 606, 614 (Mo. banc 1982).

At trial, the evidence presented by the state established the following to be the events leading up to petitioner's action on the night in question:

At the time of January 1, 1984, petitioner was living as a house guest of Lawrence Peal in Poplar Bluff, Missouri. On that day, petitioner possessed a number of handguns at Peal's house, and of these handguns, petitioner kept one weapon, a silver-colored .38 caliber pistol, in his possession. The next day, Monday, January 2, after purchasing a quantity of ammunition, .38 "hollow-point" shells/ petitioner and a friend went to some woods where petitioner practiced with the pistol by shooting some fifteen rounds of ammunition at trees and a Folger's coffee can. Both Peal and petitioner's shooting companion had seen petitioner wearing a dark blue stocking cap which doubled as a ski mask.

Between 10:30 and 11:30 p.m. on Tuesday, January 3, petitioner borrowed Peal's brown Ford station wagon and drove to the Kater Inn Package

Store in Poplar Bluff. After putting the ski mask over his face, he entered the store with his pistol and threatened to kill the cashier unless the money from the cash register was surrendered. While the clerk was removing the money from the register and placing it on the counter, Sandra Buttry entered the store and petitioner ordered her to lie on the floor. When the robbery was finished, petitioner grabbed Buttry's arm and forced her to accompany him outside, saying that he "had better plans" for her. Petitioner pointed his pistol at Ms. Buttry's male companion who had been waiting outside, and forced Buttry into the brown Ford station wagon and drove away. Once in the car, petitioner removed his ski mask. While petitioner was driving, Buttry asked why he had taken her, to which petitioner replied that he was going "to get a piece of ass." Ms. Buttry demured, and petitioner replied, "shut up, bitch," and ordered her to unzip his pants. When she tried and was unable to do so, petitioner

unzipped his own pants and directed her to "suck it off, bitch." Ms. Buttry then opened the car door and jumped out, whereupon petitioner shot her in the back with his pistol. While being aided by a passing motorist, Ms. Buttry saw petitioner drive past her twice and then continue on in a southerly direction. Ms. Buttry testified that during the time she was in the presence of petitioner, he never staggered, slurred his speech, or appeared erratic in his motions.

At around midnight, some thirty minutes after the robbery of the Kater Inn Package Store, petitioner walked into the Blue Moon Tavern in Poplar Bluff. A total of eight men and women, including three employees and five customers, were inside the tavern; four of these individuals, including Ronald Felts, were gathered around a pool table playing pool. As petitioner entered the tavern, he walked to the center of the room, drew his pistol, and announced, "This is a holdup. Everyone hit the floor. " When the occupants did not hear or

comply with petitioner's order immediately, petitioner said, "I said this is a holdup. Hit the floor. I mean business and I'll make an example out of you." Petitioner then aimed his pistol at Ronald Felts, who was standing with several others near the pool table, and shot him through the head. Felts died of this wound.

Once the surviving patrons and employees were on the floor, petitioner directed the tavernowner, Ellen White, to open the cash register so that he could collect the money from behind the bar. While doing so, he fired a shot over the heads of White and the bartender, Randy Jenkins, and told White and Jenkins that they were coming with him; and the three walked to the end of the bar. Petitioner then forced Jenkins to lie back down on the floor and shot him in the head. Petitioner told White, "bitch, you're going with me. You're going to give me head," and shoved her out the door of the tavern. Petitioner forced White into the brown Ford station wagon he had been driving, but the car

got stuck on a curb as he attempted to drive away. White and petitioner went back into the tavern to get White's car keys. Upon re-entering, petitioner encountered fifteen-year-old Lori Spradling and threatened to kill her if she had called the police. Petitioner reminded Spradling and White that he had already killed once and would kill again. Petitioner then forced White back outside, fired a shot at a bystander in the process, and forced her into the driver's seat of her car, a 1973 Ford Torino. While driving petitioner away from the tavern, White complained that she could not see out of the frosted windows. She opened the car door, as if to look for traffic, and jumped out of the car and ran.

On Wednesday, January 4, at 12:30 a.m., petitioner drove up to the Coach Light Motel in Poplar Bluff. He entered the motel lobby, produced his pistol, and proceeded to rob the cashier, Mrs. Ollie Gaultney. Petitioner then told Mrs. Gaultney that she was coming with him, and

she resisted. Mrs. Gaultney's husband, roused by the commotion, came downstairs from their living quarters, and petitioner threatened him with his gun by saying, "I'll kill you. I've killed already tonight and I'll kill you." When petitioner again attempted to abduct Mrs. Gaultney, a struggle ensued between petitioner and Mr. Gaultney in which petitioner was eventually shoved outside and the door closed. Before petitioner drove away, Mr. Gaultney fired three shotgun blasts into the radiator of the car petitioner was driving. Later that morning, petitioner entered Junior's Food Mart in Corning, Arkansas, where he fired a shot into the ceiling, and demanded a car and a driver. Petitioner said, "I've done killed once tonight. Wouldn't bother me to do it again." One of the persons in the store pointed out his own vehicle and said the keys were in it. Petitioner went outside and started to drive away. As he was exiting the parking lot, the police stopped and arrested petitioner.

The Missouri Court of Appeals analyzed this claim and found it without merit. Kenley, supra, 759 S.W.2d at 349-50. Petitioner does not contend any circumstance precludes the application of the presumption of correctness, and this Court finds the state court's finding supported by the record.

Upon careful consideration of the record, the Court finds and agrees with the Missouri Court of Appeals that the evidence of deliberation was overwhelming as demonstrated by the evidence included in the trial transcript. Indeed, the record reflects at least two eyewitnesses, Sandra Buttry and Randy Jenkins, testified that petitioner acted deliberately in his actions and that he did not slur his speech or stagger. Thus, the choice not to develop evidence concerning petitioner's ability to premeditate on the day in question as a result of his alleged intoxication and/or drugged condition was reasonable under the circumstances. The Court consequently finds trial counsel's

performance was not deficient, and therefore the Court need not and will not address the prejudice prong of the Strickland test for constitutionally ineffective assistance of counsel.

Petitioner next alleges that trial counsel was ineffective in failing to object to the testimony of the decedent's widow concerning the fact that decedent had two children, and to testimony regarding numerous unrelated handguns in possession of the petitioner.

The Missouri Court of Appeals made findings concerning these claims on petitioner's appeal to the court from the denial of his 27.26 motion, by stating:

> Appellant also complains that the attorney failed to object to identification by the decedent's widow. Mrs. Felts identified as her husband the man pictured in previously-admitted Exhibit #3. Earlier, Exhibit #3 had been identified by a criminal investigator who photographed the victim at the Blue Moon. Mrs. Felts also mentioned she had two children. To mention of this was made on direct appeal or in either of the two Rule 27.26 motions tendered by

appellant. We understand that appellant does not assert this "error" independently, but only as part of the alleged mass of cumulative attorney error which he claims contributed to the ineffective representation. However, the only evidence that may have been inadmissible was that concerning the fact that the deceased had two children. State v. Baublits, 324 Mo. 1199, 27 S.W.2d 16, 19 (1930). In light of the overwhelming evidence against appellant, it is difficult to see any prejudice to appellant, considered alone or in conjunction with the rest of the alleged "inefficiencies" of the attorney's conduct of appellant's defense.

Appellant complains that evidence that he came to Lawrence Peal's house on January 1, 1984, with 17 handguns reached the jury. The objection was sustained as being unrelated to the crime and the state was directed to identify only the one weapon that was used. It is true that the attorney might have asked the court to strike the number of handguns from the record, but it is difficult to see how this omission prejudiced the appellant in any substantial way. The jury had already

> heard that appellant brought 17 handguns to the house. A motion to strike might just have drawn their attention to the number. Admittedly, the attorney's objection should have been made before the witness answered, but as a practical matter the answer may have come more quickly than expected or might have been unexpected. The record reflects the order in which the reporter took down the testimony and objections, it does not give us insight into whether or not the attorney attempted to object before the actual answer was given. The attorney stated the objection and grounds therefore [sic] in open court; the jury knew the impropriety of the introduction of that testimony.

Kenley, supra, 759 S.W.2d at 350 (emphasis in original). The above findings concerning counsel's failure to object to this testimony are entitled to the presumption of correctness in the related federal habeas proceeding established in 28 U.S.C. § 2254(d). Sumner, supra, 449 U.S. 539 (1981). Petitioner does not contend any circumstance precludes the application of the presumption of correctness, and the Court

finds that state court's findings supported by the record. Upon careful consideration of the record, the Court finds, in light of the overwhelming evidence of petitioner's guilt, petitioner suffered no Strickland prejudice.

Petitioner also alleges that trial counsel was ineffective during voir dire in failing to question the jury panel whether they would automatically impose a sentence of death after a finding of capital murder, i.e., trial counsel failed to "reverse Witherspoon."

The Rule 27.26 trial court considered this claim and held:

> The court concludes that failure to ask the "reverse Witherspoon" question is not indicative that the jurors were committed to giving the death penalty regardless of the circumstances. On the contrary, all jurors who were questioned stated they would base their decision as to whether or not to give the death penalty upon the facts and law as they were presented. Defendant has failed to sustain his burden of showing prejudice.

And see Kenley, supra, 759 S.W.2d at 352-53.

The findings by the state courts are entitled to the presumption of correctness established in 28 U.S.C. § 2254(d). Petitioner does not contend any circumstance precludes the application of the presumption of correctness, and this Court finds the state courts' findings supported by the record. Upon careful consideration of the record, the Court finds that the venire indicated that the veniremen would listen to the evidence and decide the case based upon the court's instructions and with reference to the facts and law, and consequently, trial counsel had no duty to ask a reverse Witherspoon question. The Court finds reasonable trial counsel's conduct under the circumstances. As a result of the Court not finding petitioner's trial counsel's performance deficient, the Court will not address the prejudice prong of the Strickland test.

Petitioner next alleges that trial counsel was ineffective during the punishment stage in

failing to submit and argue as a mitigating factor that petitioner had no significant history of prior criminal activity.

The Missouri Court of Appeals made the following finding when reviewing this claim:

> One of the mitigating circumstances recognized in § 565.032.3(1), RSMo 1986, is that "[t]he defendant has no significant history of prior criminal activity." The trial transcript indicates that appellant was convicted of the Class C felony of stealing and sentenced to a term of four years in the Missouri Department of Corrections. The attorney had submitted that fact as mitigating evidence but withdrew it prior to the penalty phase. The prosecution then submitted that evidence for the jury's consideration. The attorney's confusion as to its submission is apparent from the transcript and belies the explanation he offered at the hearing that he did not offer it as a mitigating circumstance to keep the prosecution from "harping" on that conviction. The prosecutor made it known to the attorney that if he did not offer it as a mitigating circumstance, the prosecutor would offer it into evidence himself.
>
> Even if the attorney

> should have submitted that mitigating circumstance, it is difficult to see how appellant was prejudiced. First, if appellant's concern is for the jury to know he only had one prior offense, that fact was brought out at trial. The fact that it was only a Class C felony of stealing was explicitly mentioned. Second, the instruction to the jury made them aware "You may also [in addition to the mitigating circumstance of age already submitted] consider any circumstances which you find from the evidence in extenuation or mitigation of punishment." The jury knew it could consider the lone prior offense in mitigation of appellant's punishment. Mo prejudice has been shown by appellant to have resulted from this omission if it was such.

Kenley, supra, 759 S.W.2d at 353-54. The Court finds the state court's prejudice analysis to be correct in light of the certified copy of the sentence and judgment being admitted into evidence and the jury being instructed that it could consider any circumstances which the jury could find from the evidence in extenuation or mitigation of punishment so that the jury knew it could consider petitioner's only prior

offense in mitigation of his punishment. Moreover, under the circumstances, the prosecutor would have been able effectively to rebut an allegation that petitioner had no significant prior criminal history in light of petitioner's prior conviction for a felony for which he served time with a significant prison term. Furthermore, the finding by the Missouri Court of Appeals is entitled to the presumption of correctness and this Court finds the state court's finding supported by the record. Upon careful examination of the record, the Court finds reasonable trial counsel's conduct and trial counsel's performance was not deficient.

Petitioner also alleges that trial counsel was ineffective in that, during the punishment stage of the trial, he failed to object to the prosecutor's argument which referred to a report not admitted into evidence, which the prosecutor had read, which indicated the death penalty was a deterrent to crime.

The Missouri Court of Appeals considered this claim of error and denied it.

The remarks were made in the following context:

> What I want you to consider is what happened in this country and that has happened in this country over the last ten or fifteen years that we have not had--not instated the death penalty. What has happened to us?
>
> You all have lived in our society during the last fifteen years. What's happened from the early sixties, the late fifties, to 1984? What happened in the years that we got soft on crime?
>
> And I think you're going to have to aqree with me, if you reflect at all, that our society has become a society where the cutthroats and the murders [sic in original] can do what they want.
>
> And we read it so often in the paper that it doesn't even bother us any more. We see blood and gore every day on TV and our children see it and they think that that's what life's all about now.
>
> Every man for himself. The man with the biggest gun wins. The man that shoots first wins and the losers are those people

> who are hurt and maimed and left lying dead on the floor.
>
> Now you might ask, "Is that the state of conditions as a result of us not having the death penalty?" And you might say, "We've had the death penalty all along." But have we?
>
> No. We have had individuals sentenced to death but there was not a conviction in this country since the late sixties until 1983. And what happened in 1983? What report came out about three days ago and showed us that violent crime dropped more than ten percent in 1983?
>
> When this society decides to get tough on crime and when this society decides that punishment must be sure, then we will not have to live in fear in our society any more.

It is generally true that counsel should refrain from arguing matters not in evidence. State v. Bailey, 526 S.W.2d 40, 43 (Mo. App. 1975). However, prosecutorial comment referring to facts not before the jury may be permissible, so long as it does not imply special knowledge of evidence pointing to a defendant's guilt. State v. Newlon, 627 S.W.2d 606, 617 (Mo. banc 1982), cert. denied, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149, rehearing denied, 459 U.S. 1024, 103 S.Ct. 391, 74 L.Ed.2d 520 (1982). Moreover, the prosecutor may comment on the prevalence of crime, the necessity of law enforcement to deter crime, and the evil results which

> might befall society if a jury fails to perform its duty. State v. Hubbard, 659 S.W.2d 551, 558 (Mo. App. 1983). The prosecutor's final argument may exploit legitimate inferences which the evidence yields and the law allows the prosecutor wide latitude for comment. State v. Hodges, 586 S.W.2d 420, 427 (Mo. App. 1979).

Kenley, supra, 759 S.W.2d at 354-55.

The findings by the Missouri Court of Appeals are once again entitled to the presumption of correctness, and this Court finds the state court's findings supported by the record. Moreover, Missouri courts have found it to be permissible for a prosecutor to argue the deterrent effect of capital punishment and proper for the prosecutor to plea for strict law enforcement. See State v. Gilmore, 681 S.W.2d 934, 944 (Mo. banc 1984); Newlon, supra, 627 S.W.2d at 618-19. The Court consequently finds trial counsel's performance not deficient for failing to object to this argument.

Petitioner further alleges that trial counsel was ineffective as a result of counsel, during his own closing argument in the

punishment stage of trial, making a direct reference to petitioner's failure to testify.

In reviewing this claim, the Missouri Court of Appeals found the claim to be without merit. **See Kenley**, supra, 759 S.W.2d at 350. The Missouri Court of Appeals' finding is entitled to the presumption of correctness and this Court finds the state court's finding supported by the record. Upon careful examination of the record, the Court finds reasonable trial counsel's argument asserting that petitioner should not be condemned to die merely because he did not testify and trial counsel's performance was not deficient. Since the court has not found petitioner's trial counsel's performance deficient with respect to his conduct during closing argument in the punishment stage, the Court will not address the prejudice prong of the Strickland test.

In his final allegation of ineffective assistance of counsel, petitioner asserts that

at the punishment stage of his capital murder trial, his counsel was ineffective in failing to investigate and possibly present to the jury any possible mitigating evidence on his behalf concerning the medical, psychological, and psychiatric testimony and reports of psychiatric social worker, Lois Crownover, and child psychiatrist, Dr. Maria Manion, both of whom previously treated petitioner.

The Eighth Circuit Court of Appeals delineated the test for determining whether counsel is ineffective in not presenting any mitigating evidence as being "not whether there was no mitigating evidence, but rather, whether the lack of mitigating evidence was the result of adequate investigation and sound strategy." Laws v. Armontrout, 863 F.2d 1377, 1385 n.8 (8th Cir. 1988)(en banc), cert. denied, 109 S.Ct. 1944 (1989), reh. denied, 104 L.Ed. 1041 (1989). The appellate court further explained the test by stating:

the absence of mitigating evidence

> does not inexorably lead to a conlusion of ineffective counsel. One must look further and determine why the mitigating evidence was not produced. If counsel has through neglect failed to discover such evidence, then counsel will be found ineffective. If, however, counsel did not produce the mitiating evidence because, after a reasonable investigation and exercise of professional judgment, he has determined that withholding such evidence is the more strategically sound course, then there has been no ineffectiveness.

Id. at 1385. The court stressed in the **Laws** opinion that "it is not the failure to present mitigating circumstances, but rather the reasons for the failure to present mitigating circumstances, that are the proper subject for judicial scrutiny." Id. at 1386.

In describing the defense counsel's duty to investigate, the Strickland court explained:

> counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, [199 U.S. App. D.C. 359], 372-373, 624 F.2d [196], 209-210 [(en banc), cert. denied, 444 U.S. 944 (1979)].

Id. at 691. In particular, the reasonableness of a decision not to investigate depends upon the strategic choices and information provided by the defendant to his counsel.

In determining whether counsel's performance was deficient, petitioner must show that counsel's representation fell below an objective

standard of reasonableness, considering all the circumstances. Laws, supra, 863 F.2d at 1387. Judicial scrutiny of counsel's performance must be highly deferential in light of the wide latitude counsel must have in making tactical decisions. The court must further "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy."' Id. at 1387 (quoting **Strickland**, supra, 466 U.S. at 689).

Applying these standards to this case, and presuming the state courts' factual findings are correct, the Court is compelled to conclude that petitioner received effective assistance of counsel in light of the Eighth Circuit's decision in Laws.

Generally, petitioner asserts that his trial counsel failed adequately to investigate and develop his past psychiatric treatment

record as demonstrated by counsel's failure to discover petitioner's military records. Petitioner claims that presentation of his psychiatric background might have produced a different result.

The Rule 27.26 court found as fact the following:

> The final complaint of Movant is that his counsel failed to produce mitigating evidence in the sentencing stage of the trial. In this regard, he refers to evidence by Mrs. Lois Crownover and Dr. Maria Manion. The sum total of Mrs. Crownover's testimony would be that as a young boy between the ages of 11 years and 15 years, the defendant had been aggressive, hostile and not functioning in the classroom and as a result of such conduct, he had been expelled from school. The testimony of Dr. Manion would have been that as a teenager the defendant would go into a state of uncontrollable rage, that he was extremely defensive, difficult to work with, not communicative, expressed negative and hostile feelings toward his family, especially his father; that he had only really shown any improvement while on medication in an institutional situation. Neither Dr. Manion's nor Mrs. Crownover's testimony would conclusively show that the defendant was suffering from any mental disease or defect. A jury could have reasonably con-

> cluded from their testimony that the defendant was an extremely vicious and dangerous personality, capable of having killed the victim in cold blood and having little regard for the feelings or concerns of other individuals or society in general. The counsel, in making a strategic decision not to call these witnesses, cannot be held to have violated his duty toward his client or be charged with ineffective assistance of counsel.

In reviewing the findings of the Rule 27.26 court, the Missouri Court of Appeals affirmed and found against petitioner. See Kenley, supra, 759 S.W.2d at 344-48.

This Court finds that trial counsel's decision to not further investigate and present psychiatric evidence was based on a reasonably thorough investigation into petitioner's character and into other information potentially relevant to mitigating circumstances. Although the record is devoid of counsel's investigation of petitioner's military background for purposes of the punishment stage at trial, this Court believes that the record reveals that counsel acted within the bounds of professional

competency under the circumstances. After reviewing Ms. Crownover's documentation of her involvement with petitioner and discussing Dr. Parwatiker's report with Dr. Wiscowski for over a period of six hours, trial counsel made the reasonable decision that petitioner's interests would not be served by developing and presenting this type of evidence. The Supreme Court in Strickland decided that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91. The state courts' findings of fact are entitled to a presumption of correctness as established under 28 U.S.C. § 2254(d), and the Court accepts the state courts' legal conclusion of effectiveness based on those facts.

The Court has given due deference to counsel's performance in light of the wide latitude counsel must have in making tactical decisions as outlined in Strickland. The Court also notes

that the introduction of evidence in both the guilt and punishment phases of a capital case, like the selection of witnesses to be called, is a question of trial strategy that may not support a finding of ineffective assistance of counsel, even if later shown to be wrong.

The following Laws case passed through this Court. Laws v. Armontrout, 834 F.2d 1401 (8th Cir. 1987), vacated and iudgment reversed en banc, 863 F.2d 1377 (1988), cert. denied, 109 S.Ct. 1944 (1989). This Court found ineffective assistance of counsel in the punishment phase. The panel reversed this Court two to one, and the full court considered this matter en banc and reversed this Court six to four. Based on the facts of that case, this Court believes it is virtually impossible to find ineffective assistance of counsel in the Eighth Circuit. At least this Court believes it may be impossible for the court of appeals to find it.

Based on the available record and the deferential standard of review, the Court finds

trial counsel's decision not to present mitigating evidence in this case was an informed and reasoned judgment. Counsel could have concluded that the decision to present psychological testimony would have damaging results because the rest of the damaging testimony would also be available. Furthermore, Dr. Parwatiker's results of the psychiatric evaluation of petitioner would be admissible on cross-examination to refute any testimony that petitioner was disturbed and mentally ill. The findings contained in Dr. Parwatiker's report that petitioner did know and appreciate the nature and wrongfulness of his conduct and was capable of conforming his conduct to the requirements of law, were potentially more damaging than the scant mitigating evidence available as noted by the state courts. Moreover, in view of the fact that counsel observed petitioner to be coherent and exhibiting no erratic behavior while working with him on the case, counsel's decision not to raise

petitioner's mental state as a mitigating factor at trial is further supported.

The Court concludes that under Strickland, counsel conducted an adequate investigation into the possibility of presenting evidence concerning petitioner's psychological and psychiatric background. In view of the fact that the evidence did not support a conclusion that petitioner had a mental disease or defect, counsel was not obligated to investigate further into petitioner's psychological background. Counsel's performance with respect to this decision cannot be considered deficient under the circumstances, and petitioner has failed to overcome the presumption that, under the circumstances, the challenged decision might be viewed as sound trial strategy. Petitioner has therefore failed to satisfy the first part of the Strickland test by failing to show his trial counsel's performance fell below an objective standard of reasonableness.

In light of the foregoing, petitioner's request for habeas relief of his capital murder conviction will be denied on the merits. To the extent respondent's objections to petitioner's exhibits remain pending, those objections will be denied without prejudice.

Dated this day of July, 1989.

WILLIAM L HUNGATE
UNITED STATES DISTRICT JUDGE